

**BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA**

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<b>APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 40D 30159443 BY JOHN HILLENBRAND</b>	) ) )	<b>PRELIMINARY DETERMINATION TO GRANT PERMIT</b>
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On January 26, 2023, at 4:50 p.m., John Hillenbrand (Applicant) submitted Application for Beneficial Water Use Permit No. 40D 30159443 to the Glasgow Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC). The Application is for 27.5 acre-feet of water in an existing reservoir for year-round livestock use. The Applicant held a pre-application meeting with the Department on January 26, 2023. The Department published receipt of the Application on its website. On January 26, 2023 the Department granted the Applicant's request for a variance from collecting stream measurements per ARM 36.12.1702(4). The Application was determined to be correct and complete on March 23, 2023. An Environmental Assessment for this Application was completed on April 26, 2023.

**INFORMATION**

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600-SW
- Aerial imagery map depicting the point of diversion and place of use.
- Attachments:      Reservoir/Place of Storage Addendum, Form 600-SA  
                                DNRC memo granting a variance from stream measurement collection,  
                                dated January 26, 2023  
                                Consultation review letter by Montana Sage Grouse Habitat Conservation  
                                Program, dated November 29, 2021

### Information Received after Application Filed

- N/A

### Information within the Department's Possession/Knowledge

The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Glasgow Regional Office at 406-228-2561 to request copies of the following documents:

- USGS Water-Resources Investigations Report 84-4143: A Method for Estimating Mean Annual Runoff of Ungaged Streams Based on Characteristics in Central and Eastern Montana by R.J. Omang and Charles Parrett, June 1984.
- Basin characteristics of Big Dry Creek Basin (Basin 40D) from USGS StreamStats website (<https://streamstats.usgs.gov/ss>)
- Precipitation data from National Oceanic and Atmospheric Administration Monthly Climate Normals 1991-2020, [U.S. Climate Normals | National Centers for Environmental Information \(NCEI\) \(noaa.gov\)](https://www.noaa.gov/data/normal-data)
- DNRC Technical Memorandum: Pond and Wetland Evaporation/Evapotranspiration, dated November 8, 2019
- DNRC Monthly Net Evaporation 1991-2020 dataset
- Department water right records of existing rights

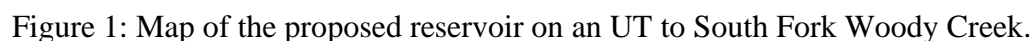
The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA).

## **PROPOSED APPROPRIATION**

### FINDINGS OF FACT

1. The Applicant proposes to divert water from an Unnamed Tributary (UT) to South Fork Woody Creek by means of an existing on-stream dam with reservoir. The requested surface water appropriation is 27.5 AF for year-round livestock use up to 400 animal units (AU). This

2. The UT to South Fork Woody Creek is an ephemeral stream. Water diverted under this permit will be consumed by livestock and through evaporation. The Department has determined that the consumptive use by livestock is 100%.
3. The existing reservoir and proposed appropriation is located in Basin 40D, the Big Dry Creek Basin. This basin is not subject to any water right basin closure restrictions.



## **§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA**

### **GENERAL CONCLUSIONS OF LAW**

4. The Montana Constitution expressly recognizes in relevant part that:
- (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
  - (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
  - (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

- (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
- (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

5. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

- ... the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:
  - (a) (i) there is water physically available at the proposed point of diversion in the

amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, “the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural

resources conservation service and other specific field studies.” § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is “more probably than not.” Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

6. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

(1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, “uncontrolled development of a valuable natural resource” which “contradicts the spirit and purpose underlying the Water Use Act.”); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

7. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starnier (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional

permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court,

*Memorandum and Order* (2011). The Supreme Court likewise explained that:

.... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

8. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

9. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

### **Physical Availability:**

### **FINDINGS OF FACT**

10. The Applicant is requesting an appropriation of 27.5 AF from an existing dam on an UT to South Fork Woody Creek. The dam and the reservoir were constructed in the 1950s. The point of diversion is located in SENESW Section 2, T20N, R39E, Garfield County. The place of use is in SESW and NWSWSE, Section 2, T20N, R39E, Garfield County. The reservoir has a surface

area of 10 acres and a maximum depth of 6 feet. The UT to South Fork Woody Creek is an ephemeral stream which does not have a gaging station.

11. To determine the physical water availability for the UT to South Fork of Woody Creek at the point of diversion, the method described in the USGS Water-Resources Investigations Report 84-4143: *A Method for Estimating Mean Annual Runoff of Ungaged Streams Based on Characteristics in Central and Eastern Montana* (USGS Report 84-4143) was used. This method is listed under ARM 36.12.1702(7)(c) as an approved method for determining surface water flow rates and volumes on an ungaged source.

12. The USGS Report 84-4143 divides the study area into three regions based on topography and climate. The proposed reservoir is located in Region 2 of the study area. For Region 2, the Report found the most significant variables for estimating annual runoff are drainage area, mean annual precipitation, and forest cover. Three regression equations were developed for Region 2. Equation 3, which incorporates these three variables and has the lowest average standard error of estimate, is used to estimate the runoff of the drainage area above the proposed POD.

13. Equation 3: Annual Runoff in CFS =  $0.00013 \times A^{0.99} \times P^{2.69} \times (F+10)^{-0.59}$

- A is basin drainage area in square miles\* = 3
- P is average annual precipitation in inches\*\* = 13.45
- F is forest cover as percent\* = 0

\*This information is obtained from USGS website <https://streamstats.usgs.gov/ss>

\*\*Climate information for Jordan, MT is obtained from NOAA Monthly Climate Normals 1991-2020 website [U.S. Climate Normals | National Centers for Environmental Information \(NCEI\) \(noaa.gov\)](https://www.noaa.gov/data/monitoring-assessments/climate-atlas/)

$$\text{Annual Runoff in CFS} = 0.00013 \times 3^{0.99} \times 13.45^{2.69} \times (0+10)^{-0.59} = 0.11$$

$$\text{Annual Runoff in AF} = 0.11 \text{ CFS} \times 1.98 \text{ AF/day/CFS} \times 365 \text{ days} = \mathbf{77.90 \text{ AF/year}}$$

14. The diversion is located on an ephemeral stream with existing water rights upstream. To determine the physical water supply for the proposed appropriation, volume of each surface water right upstream of the proposed POD in the UT to South Fork Woody Creek watershed is first quantified. Upstream water right volumes are then subtracted from the annual runoff to determine the physical availability of water at the proposed POD.



15. An upstream water right's volumetric demand is assigned in the following order depending on whether a volume is specified in the water right:
- I. Decreed volume
  - II. Reservoir capacity
  - III. Claimed volume in the original filing of statement of claim
  - IV. The amount of water consumptively used for stock watering at the rate of 30 gallons per day per animal unit.

16. Table 1 lists the water rights upstream of the proposed dam in the UT to South Fork Woody Creek watershed:

<b>Table 1: Surface Water Right in the UT to South Fork Woody Creek Watershed Upstream of the Proposed Dam</b>			
<b>Water Right Number</b>	<b>Use</b>	<b>Volume (AF)</b>	<b>Period of Diversion</b>
40D 63446-00	Wildlife	35.21	01/01 to 12/31
40D 63447-00	Stock Dam	0.79	01/01 to 12/31
40D 121902-00	Stock Dam	2.32*	01/01 to 12/31
40D 30151209	Stock Dam	1	01/01 to 12/31
Total volume = 39.32 AF			

\* This Statement of Claim was decreed for 6900 animal units at 30 gallons per day year-round, or 232AF. The original claim file stated that these AUs consumed water from more than 100 reservoirs owned by the Applicant. Therefore, the volume assigned to this stock right is  $232 \text{ AF}/100 = 2.32 \text{ AF}$ .

17. Table 2 shows physical availability as the annual runoff minus the volume held by upstream water rights:

<b>Table 2: Physical Availability at Proposed POD</b>			
	<b>Estimated Annual Runoff</b>	<b>Existing Water Right Upstream</b>	<b>Volume Physically Available</b>
<b>Volume Per Year (AF)</b>	77.90	39.32	38.58

18. The Department finds water is physically available at the proposed point of diversion in the amount the Applicant seeks to appropriate.

### CONCLUSIONS OF LAW

19. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that “there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate.”

20. It is the applicant’s burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

21. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

22. Use of published upstream gage data minus rights of record between gage and point of diversion adjusted to remove possible duplicated rights shows water physically available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001).

23. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 10-18)

### Legal Availability:

### FINDINGS OF FACT

24. The diversion is located on an ephemeral stream with existing water rights downstream. To determine the legally available water for the proposed use, existing legal demands on UT to South Fork Woody Creek and South Fork Woody Creek in the area potentially impacted by the

proposed use will be identified. The Department considered the area of potential impact to be from the proposed dam to the confluence of South Fork Woody Creek and North Fork Woody Creek, which forms Woody Creek. The distance of this reach is approximately 5 miles.

25. There is one existing water right in the area of potential impact. Per DNRC protocol, since this water right does not have a decreed volume, the volume claimed in the original water right file is used as legal demand. Table 3 summarizes the existing legal demand within the area of potential impact:

<b>Table 3: Existing Water Rights in the Area of Impact</b>				
<b>Water Right Number</b>	<b>Type</b>	<b>Use</b>	<b>Claimed Volume (AF)</b>	<b>Period of Diversion</b>
40D 121905-00	Statement of Claim	Stock dam	19.2	01/01 to 12/31

26. Since South Fork Woody Creek is an ephemeral tributary to Woody Creek and there are multiple tributaries contributing to flow in the area of potential impact, the proposed POD is responsible for a portion of each water right's legal demand volume. This portion is represented by the proposed POD's portion of each water right's drainage area.

27. Table 4 shows how portioned legal demand is calculated:

<b>Table 4: Legal Demand Assumed by the Proposed POD</b>				
<b>Water Right</b>	<b>Drainage Area (square miles)</b>	<b>Claimed Volume (AF)</b>	<b>Proposed POD Drainage Area ÷ Downstream Right's Drainage Area</b>	<b>Portioned Legal Demand (AF)</b>
Proposed POD	3	--	--	--
40D 121905-00	18.5	19.2	$3/18.5 = 16\%$	$19.2 \times 16\% = 3.11$
<b>Portioned Legal Demand = 3.11 AF</b>				

28. Legal availability is calculated by subtracting existing legal demands from the volume of physical water supply at the proposed POD. Legal availability is then compared with the proposed appropriation, as shown in Table 5:

<b>Table 5: Comparison of Physical Availability, Legal Availability, and Proposed Appropriation</b>					
<b>Volume per Year (AF)</b>	<b>Physically Available</b>	<b>Legal Demand</b>	<b>Legally Available</b>	<b>Requested Appropriation</b>	<b>Legal Availability - Requested Appropriation</b>
01/01 to 12/31	38.58	3.11	35.47	27.48	7.99

29. The Department finds that the volumes in the tables above confirm legal availability of water for the amount the Applicant seeks to appropriate during the proposed period of diversion.

### CONCLUSIONS OF LAW

30. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

- (A) identification of physical water availability;
- (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
- (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

31. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that those burdens are exacting.); see also Matter of Application for Change of Appropriation Water

Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005) )(it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

32. Use of published upstream gage data minus rights of record between gage and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

33. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the Department and other evidence provided to the Department. § 85-2-311(1)(a)(ii), MCA (FOF 24-29).

### **Adverse Effect**

#### **FINDINGS OF FACT**

34. The Applicant is proposing to divert 27.5 AF for 400 AU livestock using an existing dam and on-stream reservoir in SESW and NWSWSE, Section 2, T20N, R39E, Garfield County from January 1 to December 31.

35. During times of water shortage, the Applicant will install a pump capable of pumping 3000 GPM and release water as necessary to satisfy calls for water by senior users downstream.

36. The Department finds there will be no adverse effect because the amount of water requested is legally available at the point of diversion and the Applicant's plan to cease appropriation during times of water shortage is adequate.

## CONCLUSIONS OF LAW

37. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected.

Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

38. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(5)

39. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

40. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their “historic beneficial use.” See Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

41. It is the applicant’s burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-

2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

42. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

43. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b) , MCA. (FOF 34-36)

### **Adequate Diversion**

#### **FINDINGS OF FACT**

44. The means of diversion is an existing on-stream dam capturing runoff from the contributing drainage on an UT to South Fork Woody Creek. The dam is 9 feet high, 250 feet long and 13 feet wide. The reservoir was built in the 1950s and has a maximum surface area of approximately 10 acres, a maximum depth of 6 feet and a capacity of 24 AF. Aerial photos from 2003 to 2021 have shown the dam holding water consistently.

45. Spillway is 10 feet wide and 5 feet below the crest of the dam. It discharges water back to the source on the northeast side of the dam.

46. The Department finds the diversion means and operation are adequate for the proposed use of 27.5 AF/year.

#### **CONCLUSIONS OF LAW**

47. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

48. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

49. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 44-46).

### **Beneficial Use**

#### **FINDINGS OF FACT**

50. The Applicant proposes to serve up to 400 AU livestock year-round. Per stockwater use standard in ARM 36.12.115(2)(c), 1 AU consumes 0.017 AF of water per year. Therefore, 400 AU will consume 6.8 AF year-round. Because the Department considers stock use 100% consumptive, 6.8 AF is also the proposed diverted volume for stock use.

51. Per ARM 36.12.113, the annual volume of water that will evaporate from the reservoir water surface must be included in the application project. Following DNRC Technical Memorandum: Pond and Wetland Evaporation/Evapotranspiration, dated November 8, 2019, and using the DNRC Monthly Net Evaporation 1991-2020 dataset, net evaporation calculated for the Jordan, MT area is 24.81 inch/year. Net evaporation = 10 acres surface area X 24.81 inch/year / 12 inch/ft = 20.68 AF/year.

52. The total beneficial use for the requested appropriation is 6.8 AF + 20.68 AF = 27.48 AF.

53. The capacity of the reservoir is 24 AF. One fill plus additional 15 percent per year will achieve the beneficial use.

54. The Department finds the proposed use of 6.8 AF for 400 AU livestock and 20.68 AF for net evaporation, for a total of 27.5 AF per year, is a beneficial use of water.

#### **CONCLUSIONS OF LAW**

55. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

56. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary



to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC et al, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial Review* (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

57. Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

58. Applicant proposes to use water for livestock purpose which is a recognized beneficial use. § 85-2-102(5), MCA. Applicant has proven by a preponderance of the evidence that stock use is a beneficial use and that 6.8 AF of livestock consumption plus 20.68 AF of evaporation for a total of 27.5 AF per year of diverted volume is the amount needed to sustain the beneficial use. § 85-2-311(1)(d), MCA, (FOF 50-54)

### **Possessory Interest**

#### **FINDINGS OF FACT**

59. The Applicant signed the application form affirming that the Applicant has possessory interest in the property where the water is to be put to beneficial use.

#### **CONCLUSIONS OF LAW**

60. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has

any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

61. Pursuant to ARM 36.12.1802:

(1) An applicant or a representative shall sign the application affidavit to affirm the following:

(a) the statements on the application and all information submitted with the application are true and correct and

(b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.

(2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.

(3) The department may require a copy of the written consent of the person having the possessory interest.

62. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 59)

### **PRELIMINARY DETERMINATION**

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 40D 30159443 should be GRANTED.

The Department determines the Applicant may divert water from an Unnamed Tributary to South Fork Woody Creek, by means of an existing on-stream dam, from January 1 to December 31 for up to 27.5 AF per year. The point of diversion is located in SENESW Section 2, T20N, R39E, Garfield County. The place of use is in SESW and NWSWSE, Section 2, T20N, R39E,

Garfield County. The reservoir has a surface area of 10 acres and a maximum depth of 6 feet. The total appropriation is 6.8 AF for up to 400 AU livestock, plus 20.68 AF of net evaporation, for a total of 27.5 AF per year.

### **NOTICE**

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 24<sup>h</sup> day of May, 2023.

/Original signed by Todd Netto/  
Todd Netto, Regional Manager  
Glasgow Water Resources Office  
Department of Natural Resources and Conservation

**CERTIFICATE OF SERVICE**

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 24<sup>th</sup> day of May, 2023 by first class United States mail.

JOHN HILLENBRAND  
HC 62 BOX 5  
JORDAN, MT 59337

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NAME

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DATE